

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER KASEBERG,
Plaintiff,

v.

CONACO, LLC, et al.,
Defendant.

Case No.: 15-cv-01637-JLS (DHB)

**ORDER REGARDING JOINT
MOTIONS**

(ECF Nos. 49, 50, 51)

On August 3, 2016, the parties filed a Joint Motion for Determination of Discovery Dispute regarding Josh Comers' deposition. (ECF No. 49.) On August 12, 2016, the parties filed the following two Joint Motions: (1) Joint Motion for Determination of Increasing Number of Depositions Permitted by Federal Rule of Civil Procedure 30(a)(2)(A)(i) (ECF No. 51); and (2) Joint Motion to Amend Scheduling Order (ECF No. 50). Having considered the arguments of the parties and the applicable law, and for the reasons set forth herein, the Court GRANTS Plaintiff's requests, as set forth below.

I. BACKGROUND

A. Factual Background

Plaintiff commenced this action on July 22, 2015 by filing a complaint against Defendants alleging copyright infringement. (ECF No. 1 ("Compl.")). Plaintiff alleges he

1 is a comedic writer engaged in the entertainment industry. (*Id.* at ¶ 14.) Plaintiff alleges
2 that after he wrote and published four jokes on his personal online blog and/or Twitter
3 account, each joke was subsequently featured in the monologue segment of the “Conan”
4 show. (*Id.* at ¶¶ 15-21.)

5 Plaintiff alleges that he published a joke regarding a Delta flight on or about January
6 14, 2015 on his personal online blog (“Joke #1”). (*Id.* at ¶ 15.) Defendants used a joke
7 about a Delta flight in the Conan show monologue on January 14, 2015. (*See* ECF No. 36-
8 1 (“Huskins Decl.”) at Exh. B at Definition K.) Plaintiff further alleges that, on or about
9 February 3, 2015, he published a joke on his personal online blog and Twitter account
10 regarding Tom Brady (“Joke #2”). (Compl. at ¶ 16.) Defendants used a joke about Tom
11 Brady in the Conan show monologue on February 4, 2015. (Huskins Decl. at Exh. B at
12 Definition M.) On or about February 17, 2015, Plaintiff alleges he published a joke on his
13 personal online blog and Twitter account regarding the Washington Monument (“Joke
14 #3”). (Compl. at ¶ 18.) Defendants used a joke regarding the Washington Monument in
15 the Conan show monologue on February 17, 2015. (Huskins Decl. at Exh. B at Definition
16 O.) Lastly, on or about June 9, 2015, Plaintiff alleges he published a joke on his personal
17 online blog and Twitter account regarding Bruce Jenner (“Joke #4”). (Compl. at ¶ 19.)
18 Defendants used a joke regarding Bruce Jenner in the Conan show monologue on June 9,
19 2015. (Huskins Decl. at Exh. B at Definition Q.)

20 Plaintiff filed copyright applications for each of the jokes at issue, deeming them
21 “literary works,” with the United States Copyright Office on March 10, 2015, March 11,
22 2015, June 26, 2015, and July 8, 2015. (Compl. at ¶ 23; *see also* ECF No. 1-2.) These
23 applications are pending. (*Id.*)

24 Plaintiff seeks a permanent injunction, actual damages, statutory damages, increased
25 statutory damages for willful infringement, and profits attributable to the infringement of
26 Plaintiff’s copyrights pursuant to 17 U.S.C. §§ 502(a) and 504. (*Id.* at pp. 6-7.) Plaintiff
27 also seeks attorney’s fees and costs and punitive damages. (*Id.* at p. 7.)

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B. Procedural Background

The Scheduling Order in this case provides that all fact discovery must be completed by the parties by August 19, 2016. (ECF No. 29 at ¶ 2.) Expert designations were due June 24, 2016, and expert disclosures pursuant to Federal Rule of Civil Procedure 26(a)(2)(A) and (B) are due August 30, 2016. (*Id.* at ¶¶ 3-4.) Supplemental expert disclosures are due September 30, 2016. (*Id.* at ¶ 5.) All expert discovery must be completed by October 28, 2016. (*Id.* at ¶ 6.) And all pretrial motions must be filed by November 28, 2016. (*Id.* at ¶ 7.)

Plaintiff has noticed and taken the depositions of the following individuals:

- (1) Defendant Mike Sweeney (taken June 22, 2016);
- (2) Danielle Weisberg (taken July 1, 2016);
- (3) Brian Kiley (taken July 15, 2016);
- (4) Rob Kutner (taken July 15, 2016); and
- (5) Christopher Hayes (taken July 29, 2016).

(ECF No. 51 at pp. 7-8; ECF No. 51-1 at ¶¶ 4-7.) Plaintiff has also noticed the following depositions:

- (1) Defendant Conan O'Brien;
- (2) Defendant Jeff Ross (set for August 17, 2016);
- (3) Josh Comers;
- (4) Andy Richter;¹
- (5) John Bugolski (set for August 11, 2016);
- (6) PMK of Defendant Conaco, LLC (noticed for August 18-19, 2016);
- (7) PMK of Defendant Time Warner, Inc. (noticed for August 18-19, 2016);
- (8) PMK of Turner Broadcasting System (noticed for August 18-19, 2016).

¹ Plaintiff learned for the first time that Andy Richter was involved in writing the jokes at issue during the deposition of Defendant Mike Sweeney on June 22, 2016. (ECF No. 51-1 at ¶ 4.) His deposition has been noticed for August 17, 2016. (*Id.* at ¶ 8.)

1 (*Id.* at pp. 8-9; ECF No. 51-1 at ¶ 8.) Therefore, Plaintiff has noticed the depositions of
 2 thirteen individuals.

3 Plaintiff initially served the deposition notices for Defendants Conan O’Brien, Mike
 4 Sweeney, and Jeff Ross, as well as Danielle Weisberg,² Josh Comers, Brian Kiley, and Rob
 5 Kutner on April 18, 2016.³ (ECF No. 51-1 at ¶ 2, Exh. A.) The depositions were all noticed
 6 for May, June, and July 2016 in Mission Viejo, California. (*Id.*) Plaintiff accompanied the
 7 notices with a letter stating that he was willing to move each of the depositions a week or
 8 two to accommodate the schedule of deponents and counsel. (*Id.*) Several of the
 9 depositions were re-noticed multiple times. (*Id.* at ¶¶ 4-6, Exh. A.)

10 Plaintiff initially served the depositions notices for the Defendant PMKs on June 7,
 11 2016. (ECF No. 50-1 at ¶ 2, Exh. A.) The depositions were noticed for July 7 and 8, 2016.
 12 (*Id.*) They have not yet been taken. (*Id.* at ¶¶ 12-14.)

13 Plaintiff learned the identities and relevance of Christopher Hayes and John
 14 Bugolski during the deposition of Defendant Mike Sweeney on June 22, 2016. (ECF No.
 15 51-1 at ¶ 4.)⁴ Plaintiff took the deposition of Christopher Hayes in July and John
 16 Bugolski’s deposition is scheduled for August 11, 2016. (*Id.* at ¶¶ 7-8.)

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 18
 19 ² Danielle Weisberg is allegedly the monologue writing assistant responsible
 20 for receiving emails containing the jokes allegedly written by Rob Kutner, Brian Kiley,
 21 and Josh Comers. (ECF No. 51 at pp. 3-4.) Ms. Weisberg also “prepares and compiles
 22 numerous documents throughout the day including the jokes written, and is present at all
 meetings where the monologue jokes for the day are discussed between the writers.” (ECF
 No. 51-1 at ¶ 5.)

23 ³ Defendant Conaco, LLC identified Josh Comers, Rob Kutner, Brian Kiley,
 24 and Mike Sweeney as the members of the writing staff who wrote, created and/or edited
 the jokes at issue in their Response to Plaintiff’s Interrogatories (Set On) served on April
 25 18, 2016. (ECF No. 38-2 at ¶ 12, Exh. 10, Interrogatory No. 4.)

26 ⁴ Christopher Hayes, a member of the IT department, allegedly has information
 27 on the timing of a key email, and John Bugolski, a member of Conaco, LLC’s research
 department, has information about documents produced in initial disclosures “which
 28 apparently show that the jokes at issue were widely used by others.” (ECF No. 51 at pp.
 7-9.)

As of the date of this order, the parties do not appear to have set a date for the depositions of Andy Richter and Defendant Conan O'Brien. (ECF No. 51-1 at ¶¶ 9-12; ECF No. 51-2 at ¶¶ 3, 6.) The parties have also not agreed on a date or method for the deposition of Josh Comers, who resides in Brooklyn, New York. (ECF No. 49 at p. 3.) Plaintiff wishes to take the deposition of Josh Comers by telephone or videoconference, which he anticipates to take two to three hours, to save on the time and expense of travel, but Defendants are not amenable to this request. (*Id.* at pp. 3-4)

II. DISCUSSION

A. Number of Depositions

Under Rule 30 of the Federal Rules of Civil Procedure, a party is entitled to up to ten depositions without leave of court, and to obtain discovery depositions beyond ten, leave of court is required. Fed. R. Civ. P. 30(a); *see also* Fed. R. Civ. P. 26(b)(2)(A) (“the court may alter the limits in these rules on the number of depositions . . . under Rule 30.”). Under Rule 30(a)(2), the court must grant leave for a party to take a deposition beyond ten “to the extent consistent with Rule 26(b)(1) and (2),” absent a stipulation between the parties. Fed. R. Civ. P. 30(a)(2)(A)(i).

Federal Rule of Civil Procedure 26(b)(1) sets out the scope of discovery as follows:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1). Rule 26(b)(2)(C) provides that the court must limit the extent of discovery if it determines that the discovery is “unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;” “the party seeking discovery has had ample opportunity to obtain the information by discovery in the action;” or “the proposed discovery is outside the scope

1 permitted by Rule 26(b)(1).” Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).

2 A party seeking to exceed the presumptive limit bears the burden of making a
3 “particularized showing” of the need for additional depositions. *Smith v. Ardew Wood*
4 *Prods., Ltd.*, No. C07-5641 FDB, 2008 WL 4837216, at *1 (W.D. Wash. Nov. 6, 2008)
5 (citing *Bell v. Fowler*, 99 F.3d 262, 271 (8th Cir. 1996); *Archer Daniels Midland Co. v.*
6 *Aon Risk Servs., Inc. of Minn.*, 187 F.R.D. 578, 586 (D. Minn. 1999)). Pursuant to Rule
7 26(b)(2)(C), courts have found it proper to deny additional depositions where they would
8 be cumulative, without proper purpose, *e.g.*, there is no evidence they would reveal
9 anything other than what a party had already obtained, the party had ample opportunity to
10 obtain the information by discovery in the action, or they would create an unreasonable
11 burden or expense. *See Bell*, 99 F.3d at 271; *Lehman Bros. Holdings, Inc. v. CMG Mortg.,*
12 *Inc.*, No. CV 10-0402 SC (NJV), 2011 WL 203675, at *2 (N.D. Cal. Jan. 21, 2011).

13 Parties should ordinarily exhaust their allowed number of depositions before making
14 a request for additional depositions. *See Thykkuttathil v. Keese*, 294 F.R.D. 597, 600 (W.D.
15 Wash. 2013) (citing *Smith*, 2008 WL 4837216, at *1 (explaining that “Rule 30(a)(2)(A)
16 clearly contemplates that a party has already taken ten depositions before a motion is filed
17 seeking leave of court for a proposed deposition that would result in more than ten
18 depositions being taken under the rule.”); *see also Authentec, Inc. v. Atrua Techs., Inc.*, No.
19 C 08-1423, 2008 WL 5120767, at *1-2 (N.D. Cal. Dec. 4, 2008).

20 Plaintiff argues good cause exists for increasing the number of depositions to fifteen.
21 In addition to the thirteen depositions listed above, Plaintiff seeks “anywhere between 1
22 and 3 additional depositions, which doesn’t include experts who may or may not be taken
23 depending on the disclosures.” (ECF No. 51 at p. 10.) As to the unknown deponents,
24 Plaintiff argues that “[s]ince the PMKs, nor Mr. O’Brien, nor Mr. Comers have been
25 deposed, there may be additional unrevealed information which may require additional
26 discovery.” (*Id.*) For these unknown deponents, the Court finds that Plaintiff has failed to
27 make the requisite particularized showing. The Court has no information by which to
28 evaluate whether these depositions would be cumulative, duplicative, burdensome, or

1 relevant. Therefore, Plaintiff's request for additional depositions of unknown deponents is
2 denied without prejudice.

3 However, as to the deponents listed above, the Court finds that Plaintiff has
4 demonstrated their testimony is relevant and necessary to the prosecution of his case. The
5 remaining deponents are defendants in this case and/or individuals who Plaintiff has
6 determined through discovery to have information relevant and potentially significant to
7 his claims. The Court also does not find the testimony sought to be to be necessarily
8 cumulative or duplicative, or the depositions unduly burdensome or expensive. The
9 depositions to date have been relatively short, with none exceeding four hours, and the
10 majority of the deponents are located in Southern California. Accordingly, the Court grants
11 Plaintiff's request to increase the deposition limit to thirteen.⁵ However, to the extent
12 Defendant Jeff Ross is also the PMK for Defendant Conaco, LLC, Plaintiff is only granted
13 leave to take twelve depositions.⁶ (*See* ECF No. 51-1 at ¶ 13.) The Court further notes
14 that to the extent Plaintiff determines that he needs to take additional depositions, including
15 the depositions of any experts, he must seek further leave of court.

16 **B. Modifying the Scheduling Order**

17 "The district court is given broad discretion in supervising the pretrial phase of
18 litigation." *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002) (quoting
19 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607 (9th Cir. 1992)). The court may
20 modify the scheduling order only for good cause. Fed. R. Civ. P. 16(b)(4); *Zivkovic*, 302
21 F.3d at 1087. In the Ninth Circuit, "[t]he pretrial schedule may be modified if it cannot
22 reasonably be met despite the diligence of the party seeking the extension." *Zivkovic*, 302
23 F.3d at 108 (citation and internal quotations omitted). "If the party seeking the
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25 ⁵ The Court does not find Plaintiff's failure to exhaust his ten deposition limit
26 before filing the joint motion to be prohibitive in light of the fact he was able to make a
27 particularized showing of the need for deposing each additional individual.

28 ⁶ Also, to the extent the parties agree the deposition of Andy Richter is
unnecessary, Plaintiff is not granted leave to depose a different party.

1 modification was not diligent, the inquiry should end and the motion to modify should not
2 be granted.” *Id.* (citation and internal quotations omitted).

3 Plaintiff argues good cause exists to extend the fact discovery deadline from August
4 19, 2016 to September 23, 2016. (ECF No. 50 at pp. 8-9.) He further argues good cause
5 exists to continue the cut-off date for expert disclosures from August 30, 2016 to October
6 14, 2016. (*Id.* at pp. 9-10.) Plaintiff relies on the contentions that he was diligent in
7 pursuing discovery, the discovery issues that arose could not have been anticipated at the
8 time of the CMC, and he promptly sought to modify the scheduling order upon learning of
9 the need to do so. (*Id.* at p. 8.) In response, Defendants argue Plaintiff has not been diligent
10 in pursuing discovery, and that any purported delay is the result of his own misconduct and
11 lack of cooperation. (*Id.* at p. 12.) Defendants do agree to extend the expert disclosure
12 deadline, but only to the extent Plaintiff’s experts will rely on the deposition testimony of
13 these untimely deponents. (*Id.* at p. 13.) In addition, Defendants contend that any
14 extension would severely prejudice its ability to bring a motion for summary judgment by
15 the deadline in the scheduling order. (*Id.*) Thus, if the Court grants Plaintiff’s requests
16 beyond two weeks, Defendants respectfully request that the Court move back its pretrial
17 motion deadline. (*Id.*)

18 The Court finds that Plaintiff has been diligent about pursuing discovery in this case.
19 With respect to depositions, Plaintiff appears to have noticed each of the depositions
20 promptly upon learning of the need for such depositions, provided more than adequate
21 notice, and worked with Defendants to schedule the depositions at a time and place
22 convenient to all parties. The Court acknowledges that some of the delay in scheduling
23 depositions was occasioned by the pending discovery disputes before this Court. The Court
24 further recognizes that both parties still have documents and information that need to be
25 produced as a result of the Court’s July 26, 2016 and August 17, 2016 orders. (*See* ECF
26 Nos. 47, 53.) Furthermore, as held above, the parties still have additional depositions that
27 need to be taken. Accordingly, the Court finds good cause to modify its February 23, 2016
28 Scheduling Order, as follows:

- 1 • The fact discovery deadline is extended from August 19, 2016 to September
2 23, 2016;
- 3 • The expert disclosures deadline is extended from August 30, 2016 to October
4 14, 2016;
- 5 • The supplemental expert disclosures deadline is extended from October 28,
6 2016 to November 4, 2016;
- 7 • The expert discovery deadline is extended from October 28, 2016 to
8 December 2, 2016; and
- 9 • The pretrial motions deadline is extended from November 28, 2016 to January
10 2, 2017.

11 **C. Josh Comers' Deposition**

12 Plaintiff initially served the deposition notice for Josh Comers, a former writer for
13 the "Conan" show, on April 18, 2016. (ECF No. 51-1 at ¶ 2, Exh. A.) The deposition was
14 set for June 23, 2016 in Mission Viejo, California. (*Id.*) On June 10, 2016, Plaintiff was
15 informed Mr. Comers works and resides in Brooklyn, New York and that Defendants were
16 still determining available dates. (ECF No. 49-1 at Exh. D.) On June 15, 2016, Defendants
17 confirmed that Mr. Comers was available July 27-29 and August 1-5, and stated that his
18 deposition must take place within 100 miles of an address in Brooklyn, New York. (*Id.* at
19 Exh. E.) On July 2, 2016, Plaintiff notified Defendants of his intent to depose Mr. Comers
20 by telephone or videoconference, in order to save on the time and expense of travel. (*Id.*
21 at ¶ 10.) Defendants expressed during meet and confer efforts that they were not amenable
22 to this request. (*Id.* at ¶¶ 11-17.)

23 Presently before the Court is a joint motion in which Plaintiff requests that the Court
24 order Mr. Comers be deposed by telephonic means and/or videoconference, and
25 Defendants request that if the Court is inclined to permit a remote deposition, it enter an
26 order requiring Plaintiff to split the costs of Defendants' counsel's travel to New York and
27 provide documents in advance of the deposition, or, alternatively, deny Plaintiff's request
28 to take Mr. Comers' deposition remotely and direct Plaintiff's counsel to appear in-person

1 for Mr. Comers' deposition. (ECF No. 49 at pp. 8, 16-17.)

2 Pursuant to Federal Rule of Civil Procedure 30(b)(4), "[t]he parties may stipulate –
3 or the court may on motion order – that a deposition be taken by telephone or other remote
4 means." Fed. R. Civ. P. 30(b)(4). Rule 30(b)(4) serves to allow parties to control costs.
5 *Clinton v. Cal. Dep't of Corr.*, No. CIV S-05-1600-LKK-CMK-P, 2009 WL 210459, at *4
6 (E.D. Cal. Jan. 20, 2009) (citing Fed. R. Civ. P. 1); *see also Carrico v. Samsung Electronics*
7 *Co., Ltd.*, 2016 WL 1265854, at *1 (N.D. Cal. Apr. 1, 2016) ("Courts in this district have
8 found that remote videoconference depositions can be an effective and efficient means of
9 reducing costs."); *Jahr v. IU Int'l Corp.*, 109 F.R.D. 429, 431 (M.D. N.C. 1986) (Rule 30's
10 remote deposition rule has the purpose of "reducing the cost of federal litigation by
11 providing alternatives to traditional stenographic depositions").

12 "[C]ourts have not required a showing of extraordinary circumstances before
13 granting Rule 30(b)(4) motions." *Jahr*, 109 F.R.D. at 431. Leave "should be liberally
14 granted in appropriate cases." *Id.* "Thus, upon giving a legitimate reason for taking a
15 deposition [remotely], the movant need not further show an extraordinary need for the
16 deposition." *Id.* "A desire to save money constitutes good cause to depose out-of-state
17 witnesses [by] telephone or remote means." *Guillen v. Bank of Am. Corp.*, No. 10–05825
18 EJD PSG, 2011 WL 3939690, at *1 (N.D. Cal. Aug. 31, 2011) (citing *Cressler v.*
19 *Neuenschwander*, 170 F.R.D. 20, 21 (D. Kan. 1996)); *see also Carrico*, 2016 WL 1265854,
20 at *1.

21 Once the movant gives a legitimate reason, the burden is on the party opposing the
22 motion to show that it will suffer prejudice if the motion is granted. *See id.*; *see also*
23 *Clinton*, 2009 WL 210459, at *3 (citing *United States v. \$160,066.98 from Bank of Am.*,
24 202 F.R.D. 624, 629 (S.D. Cal. 2001); *Jahr*, 109 F.R.D. at 431). In any analysis, the court
25 should consider whether the use of remote means would reasonably ensure "accuracy and
26 trustworthiness." *Cressler*, 170 F.R.D. at 21 (citing *Rehau, Inc. v. Colortech, Inc.*, 145
27 F.R.D. 444, 447 (W.D. Mich. 1993)).

28 Plaintiff seeks to depose Mr. Comers remotely to save expense on travel costs,

1 particularly in light of the fact he anticipates the deposition will take no more than a few
 2 hours. (ECF No. 49 at p. 6.) Defendants argue a remote deposition would prejudice them
 3 in the following ways: “(1) not being present with the witness during the deposition; (2)
 4 solely incurring costs associated with travel to New York for an admittedly brief deposition
 5 in order to avoid prejudice; and (3) difficulty in the management of the anticipated exhibits
 6 and documents in a remote deposition.” (*Id.* at p. 10, lines 20-25.) The Court finds
 7 Plaintiff’s desire to save expenses on what is anticipated to be a short deposition is a
 8 legitimate reason to order a remote deposition. The Court further finds that Defendants
 9 will not be prejudiced by a videoconference deposition, and that there is no suggestion that
 10 such a method is inaccurate or untrustworthy. Defense counsel may be present with the
 11 witness during the deposition, if they so choose. However, defense counsel bears the
 12 burden of its own costs. Defendants have not provided the Court with any law to support
 13 Plaintiff paying for defense counsel’s costs, particularly when they are electing to incur the
 14 costs and they need not do so.

15 Based on the foregoing, the Court orders that Mr. Comers’ deposition may be
 16 conducted by videoconference.⁷ Plaintiff’s counsel shall provide Defendants’ counsel with
 17 a copy of all exhibits he intends to use at Mr. Comers’ deposition at least twenty-four (24)
 18 hours in advance of the scheduled deposition.

19 **III. CONCLUSION**

20 For the foregoing reasons, the Court **GRANTS** Plaintiff’s motion to increase his
 21 deposition limit to thirteen, with the limits laid out above (ECF No. 51); **GRANTS**
 22 Plaintiff’s motion to conduct Josh Comers’ deposition by videoconference, with the
 23 conditions laid out above (ECF No. 49); and **GRANTS** Plaintiff’s motion to amend the
 24 Scheduling Order (ECF No. 50), as follows:

- 25 • The fact discovery deadline is extended from August 19, 2016 to September
 26 23, 2016;

27
 28 ⁷ The Court does not authorize a telephonic deposition.

- The expert disclosures deadline is extended from August 30, 2016 to October 14, 2016;
- The supplemental expert disclosures deadline is extended from October 28, 2016 to November 4, 2016;
- The expert discovery deadline is extended from October 28, 2016 to December 2, 2016; and
- The pretrial motions deadline is extended from November 28, 2016 to January 2, 2017.

IT IS SO ORDERED.

Dated: August 19, 2016



DAVID H. BARTICK
United States Magistrate Judge